ARE INAUDIBILITY CONDITIONS COMPATIBLE WITH THE LICENSING ACT 2003?

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INTRODUCTION

Used as a way of curbing disturbances and reducing the impact of the late night economy on the local amenity, inaudibility conditions were a regular feature on entertainment licenses and a firm favourite of licensing officers[1]. Model pools of standard conditions[2] were used to impose requirements on operators to carry out works and impose steps relating to a wide range of issues from fire safety to public health. Coupled with the wide powers given to magistrates under the Licensing Act 1964, with the restrictions of permitted hours, the entertainment and liquor licensing systems provided a rigorous framework of local controls over licensees and their undertakings. There were criticisms though:

> The nature of any conditions that are attached to a licence inevitably varies according to the venue, the event and local considerations. But there are concerns that some conditions are excessive, that they replicate other regulations or are inappropriate to the premises or event[3].

Concerns were raised over 'seemingly unreasonable conditions'[4] adding to the costs involved in obtaining and operating a licence and over the use of standard conditions by local authorities on entertainment licences. The circular was closely followed by a white paper[5] which set out a vision of licensing reform, including proposals for reducing the regulatory burden of unnecessary regulation faced by licensees.

The Licensing Act 2003 (LA03) soon followed with what was seen as a liberalisation[6] of licensing laws, providing more freedom to operators and encouraging easier access to music and entertainment[7]. It was said that:

> [.] a less bureaucratic system and measures to prevent unnecessary conditions being attached to licences by licensing authorities will encourage many more in respect of their premises to take the opportunity to provide public entertainment.

The outdated justices and local authority licensing systems were scrapped. The Act envisaged a new approach to controls over alcohol, music and dance; allowing operators more freedom to run their businesses in the way that's best for them and the community. It offered to do this by removing the red-tape associated with several different licensing systems and the time constraints placed on operators (balancing 'liberalisation and deregulation with new levels of protection'[8]). In other words a trade off was being proposed. Businesses would be free from the chains of fixed opening and standardised conditions, but if those new freedoms were abused, a range of different enforcement actions are available to remove those freedoms.

The Act does not present itself purely as a reactive tool to enforcers though and incorporates a complex multiple themed and multi-agency approach to governance. Like the old legislation it

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[1] Under the Local Government (Miscellaneous Provisions) Act 1982
[2] For example Entertainment Technology Press - ABTT Publications, 'Model National and Standard Conditions for Places of Public Entertainment and Associated Guidance', March 2001
[3] Home Office Circular 13/2000
[4] n.3, para 3
[5] Home Office, 'Time for Reform: Proposals for the Modernisation of Our Licensing Laws' (White Paper), 1 March 2001
[6] See comments of Adrian Turner in Justice of the Peace, 164 JPN 453 (10 June 2000)
[7] Dr Howells, HL *21 May 2003 : Column 823W*
[8] DCMS press release, 9 July 2003

contains some fundamental proactive and preventative elements, allowing Licensing Authorities to place a number of limits on the way businesses operate. Despite earlier intentions these restrictions continue to take the form of conditions. In fact, from 1st of April 2007 until 31st March 2008, 62% of reviews resulted in written conditions being placed on premises licences at review hearings[9] (excluding conditions relating purely to times and activities).

It follows that the inaudibility condition continues to be a favourite of local enforcers. References to inaudibility may be regularly found on licensing policy statements[10], responsible authority guidance and sets of standard conditions[11] used by Licensing Authorities (as well as being present on potentially thousands of premises licences). Conversely, (and unsurprisingly!) the use of worded or technical conditions is disliked by the licensed sector who are worried about 'a growing number of vague, meaningless and unenforceable conditions'[12]. The *perceived abuse* of such powers may have even damaged the reputation of Licensing Authorities (enforcement officers being recently referred to as 'licensing enforcement *Nazis*'[13]).

The effectiveness of worded or technical licensing conditions as a means of controlling noise is also being doubted. A recent Select Committee Report[14] concluded by recommending that venues with a capacity of 200 or fewer people should be exempt from being required to obtain a licence for live music performances. It distinguishes noise from live music from public order problems which LA03 has failed to diminish despite the widespread use of conditions. But is the use of inaudibility conditions presently supported by the law?

DEFINING INAUDIBILITY

It is important that the various stakeholders (and there are many) first have an understanding of what is meant by 'inaudibility' as differences of opinion do exist. As the term is used in a number of different capacities we need to concentrate on what it means for the Licensing Act 2003.

It can be found expressed in it's most simple form as in the following condition: 'music emitted from the premises should not be audible at the boundary of the next noise sensitive premises'; or given a numerical classification; for example, in some circles 20dB below the background ambient in every third octave is accepted as a definition of 'inaudible'[15].

The judiciary are generally accepting of the use of objective acoustic yardsticks[16] but there will always be greater scope for levels applied locally (as opposed to those backed by parliament) to be challenged; even where those levels derive from reputable standards[17]. As with specified works on a statutory nuisance abatement notice[18], numerical licensing conditions always have the potential to be

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[9] National Statistics on Alcohol, Entertainment, and Late Night Refreshment Licensing, Department of Culture, Media and Sport <http://www.culture.gov.uk/reference_library/publications/5571.aspx> accessed 4th March 2009

[10] For example Stratford Upon Avon Council's <http://www.stratford.gov.uk/files/seealsodocs/8465/0233%20Licensing%20Act%20Policy.pdf> accessed 6th July 2009

[11] For example Eastborne District Council's <www.eastbourne.gov.uk/EasysiteWeb/getresource.axd?AssetID=7068&type=full&servicetype=Attachment> accessed 6th July 2009

[12] For example G McKenna, 'Lawyers slam 'vague' conditions', Morning Advertiser (14th January 2009)

[13] P Mellows, The Publican (16 July 2008) <www.thepublican.com/story.asp?storyCode+60498> accessed 17th July 2008

[14] Culture, Media & Sport Committee – Sixth Report in session 2008-2009, The Licesning Act 2003, (14th May 2009)

[15] P Rogers, 'Music Noise and the Licensing Perspective', Cole Jarman (Nov 2008)

[16] See Hackney LBC v Rottenberg [2007] EWHC 166 (Admin), [2008] JPL 177

[17] In Murdoch & Murdoch v Glacier Metal Co [1998] Env LR 732 it was found that noise exceeding WHO recommended maximum level did not constitute an actionable nuisance per se.

[18] EPA90, s80

subjected to a great deal of scrutiny due to error. Unfortunately, inaccuracies are compounded where the levels measured are near or below background levels; and inaudibility occurs at levels far below background. The background *itself* is not static and the removal of one noise element contributing to the background may affect the level of the activity noise (thereby bringing it above the audibility threshold).

Apart from background levels each situation presents it's own array of variables which may throw up numerous additional inaccuracies. As a result the precision of technical conditions, and therefore their reasonableness, will often be examined by an opposing side. As opposed to the reference to objective standards, one of the main benefits of subjective assessments may be demonstrated in Godfrey v Conwy County Borough Council[19]. Here, noise from a rural recording studio did not produce a measurement on a noise meter because of background farm activities yet was still found to be a statutory nuisance based purely on the opinion of an authorised officer.

Numerical inaudibility clauses are also very difficult to monitor in terms of compliance unless one has access to expertise. Monitoring such conditions become impractical for the operator and almost an impossibility for those without sufficient knowledge of acoustics. This is a crucial factor affecting the use of technical conditions under LA03 system. In Crawley Borough Council v Attenborough[20] Lord Justice Scott Baker held that

> It is important that the terms of a premises licence and any conditions attached to it should be clear; not just clear to those having specialised knowledge of licensing, such as the local authority or the manager of the premises, but also to the independent bystander such as neighbours, who may have no knowledge of licensing at all [.] It must be apparent from reading the document (licence) what the license and its conditions mean.

At the time of LA03's conception the *Blair Government* were starting to enact legislation concentrating on 'third way politics', providing LA03 with one of it's main distinguishing features; that of the direct involvement of local people in local administrative matters. As residents have a direct enforcement role (holding the same powers of review as responsible authorities) it would seem likely that a straightforward and universally understood definition be found more appropriate under LA03.

To most people, and the dictionary, 'inaudible' means 'unable to be heard'[21]. In other words if someone with a normal hearing range can hear or 'detect' an activity it is 'audible'. Adopting a literal understanding of the word, not only provides clarity to but also enables local people, to remain engaged in the licensing process. In addition, measuring audibility by ear is a lot simpler than taking of objective measurements or making an assessment of nuisance. Craik found that:

> Subjects are reliable at determining the level at which music becomes audible [.] Objective tests have been proposed but none so far will always correctly determine whether or not the music will be audible in any specific situation whereas by definition the subjective test always gives the desired answer. Subjective tests give 100% correct answers, objective tests need to have similar levels of confidence before being used[22].

Once our understanding of inaudibility is aligned with the common understanding of the word it is important that the context in which it is going to be used is examined.

PUBLIC NUISANCE

Licensing authorities must carry out their functions under the Act 'with a view to promoting the licensing objectives'[23] which are:

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[19] [2001] Env LR 38
[20] [2006] EWHC 1278 (Admin)
[21] Oxford Concise Dictionary Online <http://www.askoxford.com/concise_oed/inaudible?view=uk>
[22] See Professor RJM Craik, 'Inaudibility as a criterion for measuring amplified music', IoA, (26th Sept 2000) <www.ioa.org.uk/articles/inaudibility/Inaudibility-Craik.html> accessed 1st June 2009
[23] LA03, s4

(a) the prevention of crime and disorder;
(b) public safety;
(c) the prevention of public nuisance; and
(d) the protection of children from harm.

The objectives narrow the focus of the Licensing Authority when making determinations as to the grant or rejection of an application and the addition of licence conditions. Noise is, of course, most relevant to the third objective relating to public nuisance. It would therefore be useful to determine what is meant by the term *public nuisance* and to how far the term extends with respect to the use of noise conditions.

During it's passage through Parliament the Bill was subject to much debate and scrutiny. The text forms some useful references from which some understanding of the proposed meaning may be gleaned. It was made clear on number of occasions by it's proposers that the common law definition of 'public nuisance' was being used in LA03[24]. The use of the term was opposed by some who favoured an objective with a wider definition relating to the protection of 'amenity'[25]. The importance of the use of the term was explained by Lord McIntosh[26]:

> The Bill does not define 'public nuisance'. It retains the wider meaning that it has under common law; not that in the 1990 Act or in any other statutory definition. 'Public nuisance' therefore retains the breadth and flexibility to take in all the concerns likely to arise from the operation of any premises conducting licensable activities.

The term 'public nuisance' is therefore not narrowly focused on issues such as noise alone and, like private nuisance, may apply to a broad range of misconduct related to matters involving public safety, health, morality and the enjoyment of public rights. However, public nuisance is distinct from private or statutory nuisances in that it must affect a cross-section of the community though and not just a single person. Whether the 'community' are a larger number of people or just 'a few people living locally' will depend upon the nature, character and density of the population in the area in question as put by Romer J[27]

> any nuisance is 'public' which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as 'the neighbourhood'; but the question of whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue.

The term is repeated in the Secretary of State's guidance which states that[28]:

> Public nuisance is given a statutory meaning in many pieces of legislation. It is however, not narrowly defined in the 2003 Act and retains its broad common law meaning. It is important to remember that the prevention of public nuisance could therefore include low-level nuisance perhaps affecting a few people living locally as well as a major disturbance affecting the whole community.

The latter sentence within the above statement has provided some confusion to licensing practitioners. It has also resulted in the guidance being labelled by one judge as 'a fudge'[29]. In R v Birmingham CC Judge Zara considered that persistent low level noise, was not evidence of a public

[24] HL, 19 June 2003: Column 917
[25] see comments of Lord Phillips of Sudbury in HL, 19 Jun 2003 : Column 915
[26] HL 19 Jun 2003 : Column 913
[27] in Attorney General v PY Quarries Ltd [1957] 2 QB 169
[28] Guidance issued under s.182 of LA03 at para 7.39
[29] Judge Zara in R (on the application of Crosby Homes) v Birmingham City Council and others 2008

nuisance and, although private nuisances may well have existed, the Licensing Act 2003 did not require the Court to take those into consideration. At hearings licensing committees would therefore need to consider whether interested parties are able to provide evidence that low level noise has the potential to affect a significant number of households.

Although the decision of Judge Zara may well be reversed by a higher court in the future one would have to consider the effects of adopting a looser interpretation of the term. Take, for instance, the powers of closure under the Act for instance which allow Police officers to close premises on the basis of public nuisance. It would surely be unlikely that it be the intention of Parliament to allow a business to be shut down (and its rights infringed) on the basis of a single case of 'low-level' nuisance or more 'trivial' cases of mere annoyance where amenity is affected. The strong powers provided by LA03[30] to close premises must have been based upon a more serious and impacting scenario, one which affects more than one household. It follows, then, that examples have included that caused by an acid house party[31] and that caused by lorries associated with a trade premises being constantly driven through suburban streets[32]. Conversely where three chambers of people living within Cliffords Inn were affected by noise it was held that they did not constitute a class of the public[33].

Public nuisance is a crime in it's own right which may result in an unlimited fine and/or 2 years imprisonment in the Crown Court. In addition a licensee may be prosecuted for a failure to comply with conditions attached to it's licence[34] attracting a maximum fine of £20,000 and/or 6 months imprisonment. It is therefore important that 'conditions should not be attached to premises licences unless they are necessary to promote the licensing objectives'[35].

REASONABLENESS AND PROPORTIONALITY

Noise, after meeting certain criteria, may qualify as a private, public or statutory nuisance; there being considerable overlap. Nuisance in the context of *statutory nuisance* must be given a common law interpretation and must therefore first qualify as a private or public nuisance[36]. The criteria for which are often very similar for noise; save that a public nuisance will most likely occur as a result of a number of private nuisances. Common to all three is the concept of 'reasonableness' which is described well in Bamford v Tumley as 'A rule of give and take, of live and let live'[37]. Like competing human rights nuisance laws attempt to balance the competing interests of the party affected (for example in their right to peaceful enjoyment of property[38]) with the right of the trader to run his own business (a licence also being a proprietary right[39]).

Each case must be considered on it's own merits and therefore when considering whether a nuisance exists factors such as the duration, intensity, frequency, time of the noise and the character/nature of the locality must all be considered[40] in order to assess whether the proposed impact is reasonable.

Consider the following example of an inaudibility condition: 'Music emitted from the premises should not be audible at the boundary of the next noise sensitive premises'. The condition is clearly weighted in the favour of the nearest residential property using a zero-tolerance approach to noise. It takes no

[30] s.161 allows a senior police officer to close premises by order if he believes that a public nuisance is being caused by noise coming from the premises (mirroring the power of EHO's in the Anti-social Behaviour Act 2003 based on 'public nuisance', ss 40 and 41).
[31] R v Shorrock [1994] QB 279, [1993] 3 All ER 917, CA
[32] Gillingham BC v Medway (Chatham) Dock Co Ltd [1993] QB 343, [1992] 3 All ER 923
[33] R v Lloyd (1802) 4 Esp 200
[34] Failure to carry out an activity in accordance with the authorisation as per LA03, s136
[35] Thwaites v Wirral Borough Magistrates [2008] EWHC 838 (Admin) at para 40
[36] National Coal Board v Neath BC [1976] 2 ER 478
[37] (1862) 3 B
[38] Article 1 of the first Protocol: the right to property
[39] As confirmed in Tre Trektorer Aktiebolag v Sweden (1989) 13 EHRR 309
[40] See Stone v Bolton [1950] 1 KB 201

account of factors, such as the time of day, that are used to determine whether the degree of noise is reasonable or not and such a condition would clearly be disproportionate in an urban or city environment, especially those areas with a history of nightlife or entertainment.

The following condition goes one step further requiring that 'No noise shall be audible from patrons using the garden area'. Most will agree that it would be an impossible task to achieve in practice. The licensee would, as a result, have to chose between ceasing the use of the garden (in order to comply with the condition) or break the condition and face potential prosecution. The simultaneous grant of a licence, allowing the use of part of a premises, and it's *effective* prevention on its use through conditions may be considered irrational and likely to constitute grounds for judicial review[41].

Forming an appropriately worded condition that is sufficiently clear, precise, free from ambiguity and reasonable is a difficult task for any Licensing Authority. They must not only concentrate on whether the condition is technically enforceable but also on whether the condition is proportionate, taking into account the risk associated with the premises and the size and scale of their operation. Despite this it has been stated that, in practice, LA03 'is still too bureaucratic, complicated and time consuming' with non-profit clubs and sports clubs facing the same bureaucratic and economic burdens associated with the licensing process as larger, more profitable, commercial businesses. This, even with the statutory guidance requesting that licensing authorities 'should avoid unnecessary or disproportionate measures'[42] and the Act anticipating that a 'light touch bureaucracy'[43] be applied.

DUPLICATION

When requiring works to abate statutory nuisances the local authority are also required not be too restrictive in their demands. A balance of interests is required to the extent that the result is 'not to cure the nuisance but to restrict its occurrence or recurrence'[44]. However, unlike the powers contained in LA03, statutory nuisance[45] legislation places specific duties on the local authority to investigate[46] and react to nuisances[47]. Even where the responsible authority have chosen to use LA03 to prevent or respond to noise issues they are still bound by the duties to investigate nuisances and serve notices under EPA1990 (despite involvement of other public bodies such as the Licensing Authority in the matter[48]). Furthermore, compliance with the terms of a licence will not authorise or permit a noise nuisance to continue[49]. There does therefore seem to be some duplication of enforcement effort.

R v Bristol Magistrates' Court[50] recently considered the issue of duplication. In short, it was held that the conditions that were imposed by the Licensing Authority were judged not to be necessary to promote the licensing objectives as they were adequately covered by other legislation. (It also concluded that matters specified in the operating schedule do not have to be placed onto a licence if they are not necessary to promote the public nuisance objective). The judgement follows the guidance of the Secretary of State which states that 'conditions may not be necessary where EPA1990 adequately protects those living in the vicinity'[51]. One of the conditions that was considered in *Bristol* included: 'Noise from any ventilation, refrigeration or air conditioning plant or equipment shall not cause nuisance to the occupants of any properties in the vicinity'.

However, it is difficult to conceive a situation where the EPA90 would not be able to be used to address noise emitted from premises if, of course, it amounts to an unreasonable use of property. As a result does this judgement restrict the ability of Authorities to add or impose *any* noise conditions? It was stated that:

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[41] See Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1KB 223
[42] n.28, at para 2.34
[43] n.35, at para 42
[44] Wycombe DC v Jeffways and Pilot Coaches (1983) 81 LGR 662
[45] As contained in Part III of the Environmental Protection Act 1990
[46] EPA 1990, s79(1)
[47] EPA 1990, s80(1)
[48] R v Carrick District Council, ex parte Shelley [1996] Env LR 273
[49] Cambridge City Council v Douglas [2001] Env LR 41
[50] [2009] EWHC 625 (Admin)
[51] n.28, at para 2.35

> whether reliance on the provisions relating to statutory nuisance in the Environmental Protection Act 1990 is sufficient, so that no more is necessary to promote the licensing objectives, is a matter of judgment in any particular case[52].

There may be some instances where conditions are appropriate but this case will certainly provide applicants with further argument against the imposition of noise conditions which they feel are unnecessary.

CONCLUSION

The evidence required before granting or rejecting a licence application might involve a great deal of expert acoustical substantiation from the applicant, responsible authority or interested party. It is, however, recommended that any resultant conditions applied to the licence be formed in simplistic terms; centred around the activities that take place and at what times. There are circumstances where larger premises or events will require a cap on music levels as a proactive measure to prevent public nuisance. In such circumstances technical conditions should be tailored to the circumstances of each case and take into account characteristics such as times of operation, frequency of events, local topography and the number of people potentially affected. They should be put in as simple terms as possible and take account of the difficulties presented in measuring an acoustic value which may be near to the ambient level and susceptible to error.

It is worth remembering that all environmental permits, authorisations and licences do not seek to eliminate pollution but to allow it within certain parameters. Zero tolerance of noise, in the form of inaudibility conditions will often be an unreasonable imposition as well as being, in many cases, a practical impossibility. However, LA03 does provide a proactive stage which allows the potential for public nuisance to be screened, identified and minimised through the rejection or alteration of licence application. Nevertheless, the subjective assessments made by officers using statutory nuisance powers may remain the most frequently used enforcement with respect to noise from licensed premises. Statutory nuisance powers are supported by LA03 in the form of a review process and, ultimately powers to revoke a licence but, for the moment at least, only for those matters serious enough to impinge on a whole community. It is therefore unlikely that any standard inaudibility condition can be drafted without subjecting its author to criticism and subjecting the licensing authority to questions over it's enforceability. Perhaps, for the meantime, those drafting LA03 noise conditions might aim to bring any noise just below the threshold of public nuisance.

[52] n.50, at para 46